

On the third issue which is the crux of the matter whether or not the plaintiff has proved her case I need not go into the details of the large amount of evidence that has been adduced in this case both oral and documentary. However, after giving due consideration to all the evidence in this case I have come to the conclusion that the plaintiff is entitled to succeed. I accept her evidence that the defendant had promised to marry her and that he had later broken the promise. After hearing the evidence of the plaintiff and observing her demeanour against the whole of the evidence adduced in this case I believe that the plaintiff is a witness of truth. She might have made errors in dates and certain facts but they were not material enough to affect her credibility. On the other hand I found the defendant shrewd and unscrupulous and he had taken advantage of the position of the plaintiff. I also accept the evidence of the plaintiff that she had lived with the defendant as husband and wife and that they had sexual intercourse from the time they started living together although these do not constitute ingredients which the plaintiff has to prove. As I said earlier from all the evidence I have heard in this case I accept the plaintiff as a truthful witness. In the circumstances therefore I allow the plaintiff's claim for damages for breach of promise of marriage. As far as damages are concerned I am generally in agreement with the submission advanced by Mr. Ramachandran that exemplary damages ought not to be awarded in this case. In all the circumstances I am of the view that the plaintiff is entitled to some damages. I therefore award a sum of \$5,000 as damages and costs.

Ajaib Singh J. (delivering judgment on January 17, 1980): I do not think that I can add much more to what I said in my decision on November 1, 1979.

In support of her evidence the plaintiff had called Reverend Peter Bretaudeau (PW2) who had given a note (Exhibit D2) to the effect that the plaintiff and the defendant were engaged in the Church of the Visitation at Seremban on April 18, 1972. In his evidence however Reverend Peter Bretaudeau was not able to say categorically that the plaintiff and the defendant had in fact gone to the Church either for an engagement or for the blessing of couple and their rings. But it is significant to note that the Reverend did say in his evidence that a few years back he was approached by the plaintiff to prepare for a marriage. He had started to fill up the pre-nuptial form with the plaintiff but the form was not completed and the proposition for the marriage did not go through.

As I said earlier in my decision I accepted the evidence of the plaintiff. The engagement was not announced nor was there any formal party held or photographs taken. This is understandable in view of the fact that the plaintiff was a widow several years older than the defendant and was hardly in a position to express her feelings openly and in public. It was in her best interest not to announce the engagement but to abide by the wishes of the defendant. However as things turned out after several years of cohabitation the defendant forsook the plaintiff and married another woman.

Claim allowed.

Solicitors: Gurdial Bakan Singh; Gunaretnam & Co.

PUBLIC PROSECUTOR v. K.M. BASHEER AHMAD

[A.Cr.J. (Mohamed Azmi) March 1, 1981]
[Kuala Lumpur — Federal Territory Criminal Appeal
No. 110 of 1981]

Criminal Law and Procedure — Private prosecution — No fiat from the Public Prosecutor — Non-seizable offence becoming seizable by amendment to Act — Copyright Act, 1959, s. 15(1)(d) — Copyright (Amendment) Act 1979 (Act A 461) — Whether omission curable — Criminal Procedure Code (F.M.S. Cap. 6), ss. 376(i), 380(c) & 422.

Copyright Law — Infringement of — Seizable offence — Private prosecution — Procedure.

The respondent was discharged and acquitted in the Magistrate's court on a charge of being in possession at his bookshop 18 infringing copies of literary work, an offence under section 15(1)(d) of the Copyright Act 1969. The prosecution was instituted and conducted by an advocate and solicitor on the basis that the offence was a non-seizable offence. Unbeknown to the parties and Magistrate the non-seizable offence under section 15(1)(d) of the Act became seizable by an amendment to the Act, and thus the case could not be conducted by an advocate and solicitor unless he has fiat from the Public Prosecutor or his department. Neither the complainant nor his counsel had any written authority from the Public Prosecutor or his department to prosecute.

Held, allowing the appeal: (1) the omission was not a mere irregularity but an illegality that could not be cured by section 422 of the Criminal Procedure Code and, as such, the private prosecution before the Magistrate was a nullity *ab initio*;

(2) the order of acquittal was set aside and an order of discharge not amounting to an acquittal was substituted.

CRIMINAL APPEAL.

Muhammed Shafee bin Muhammed Abdullah (Deputy Public Prosecutor) for the appellant.

D.P. Vijendran for the respondent.

Cur. Adv. Vult.

Mohamed Azmi J.: This is an appeal by the Public Prosecutor against the order of the Magistrate at Kuala Lumpur in discharging and acquitting the respondent who was charged for being in possession at his bookshop of eighteen infringing copies of literary work entitled "Lat the Kampong Boy", otherwise than for his domestic or private use, an offence under section 15(1)(d) of the Copyright Act 1969. The case against the respondent was instituted by way of private summons by Ayoub bin Dato Ismail, the General Manager of Berita Publishing Sdn. Bhd., in whose favour the copyright in the book had been assigned.

The facts of the case in chronological order were as follows. On June 22, 1979, as a result of information lodged by Ayoub (PW5), a search warrant against the respondent's bookshop was issued by the Magistrate under subsection (4) of section 15 of the Copyright Act. After the eighteen infringing books had been seized from the bookshop, the complainant applied for summons against the respondent on November 9, 1979, and the summons was issued on November 14. The private summons case came up for mention for the first time on January 4, 1980, and at all material times, the prosecution was conducted by Mr. S.F. Wong, an advocate and solicitor representing the complainant. The trial proper commenced on April 14, 1981 and ended in the acquittal

and discharge of the respondent on June 23 the same year without his defence being called.

From the appeal records, it is clear that the private prosecution was instituted and conducted at all relevant times on the basis that the offence under section 15(1)(d) of the Copyright Act was a non-seizable offence. Although under section 376(i) of the Criminal Procedure Code the Public Prosecutor shall have the control and direction of all criminal prosecutions and proceedings under the Code, "any private person may appear in person or by advocate or, in the State of Trengganu, by a pleader and prosecute for an offence against his own person or property", in summary non-seizable cases in a court of a Magistrate — see section 380(c) Criminal Procedure Code. But in respect of private prosecution for a seizable offence before a Magistrate, it can only be done by an advocate or a pleader employed by the complainant if he is so "expressly authorised in writing by the Public Prosecutor or by a Deputy Public Prosecutor" — see section 377(a) Criminal Procedure Code.

Unbeknown to counsel for the complainant, counsel for the defendant and the learned Magistrate, the non-seizable offence under section 15(1)(d) of the Copyright Act 1969 has become seizable by the amendment made to section 15 by Copyright (Amendment) Act 1979 (Act A461) which was published in the *Gazette* on August 23, 1979, and came into force on that date by virtue of section 19(2) of the Interpretation Act 1967. By that amendment, the punishment provided for any offence under section 15(1)(d) of the Copyright Act has been increased from a fine not exceeding two thousand dollars for each infringing copy in respect of which the offence was committed or one hundred thousand dollars, whichever is the lower, to ten thousand ringgit for each infringing copy or one hundred thousand ringgit, whichever is the lower, or to imprisonment for a term not exceeding five years or to both imprisonment and fine. Under the First Schedule to the Criminal Procedure Code, it is clear that the original offence under section 15(1)(d) being punishable with fine only, was non-seizable, but with effect from August 23, 1979, it has become seizable, and, as such, the prosecution for such an offence cannot be conducted by an advocate or a pleader unless he has a fiat from the Public Prosecutor or Deputy Public Prosecutor.

In this case, it is not challenged that at all material times neither advocate Mr. Wong for the complainant nor the complainant himself had a written authority from the Public Prosecutor or his Deputy to prosecute. In my view, such omission is not a mere irregularity but an illegality that cannot be cured by section 422 of the Criminal Procedure Code and, as such, the private prosecution before the Magistrate was a nullity *ab initio*.

In the circumstances, I allow this appeal. The order of acquittal is set aside. An order of discharge not amounting to an acquittal is substituted.

Order accordingly.

Solicitors: D.P. Vijendran Associates.

SHAHARUDDIN BIN ABDUL RAHMAN v. SATISAH ISMAIL SDN. BHD.

[A.C.J. (Ajaib Singh J.) April 5, 1982]
[Ipoh — Civil Appeal No. 24 of 1981]

Practice and Procedure — Defendant absent but counsel present — Judgment in default — Magistrate erred — Scope of Subordinate Courts Rules 1980, O. 28 r. 6(1)(a).

The facts of this case were as follows. The plaintiffs' claim for \$3,904.00 being advance made to the defendant was denied by the defendant. At the hearing, the plaintiffs' representative was present together with their counsel. The defendant was absent but his counsel was present. Thereafter, on the oral application of the plaintiffs' counsel, the learned magistrate gave judgment in favour of the plaintiffs under the Subordinate Courts Rules 1980, under O. 28 r. 6(1)(a).

Held, allowing the appeal: (1) the learned magistrate was not empowered to invoke rule 6(1)(a) of Order 28 and give judgment in default;

(2) if the learned magistrate was not inclined to exercise his discretion in favour of granting an adjournment he ought to have proceeded to hear and determine the action in the normal manner which meant that the plaintiff had to prove their case by adducing sufficient evidence and their witnesses would have been subject to cross-examination by the defendant's counsel who would also have the right to call witnesses for the defence and to make a submission to the court at the end of the hearing. Similarly, if the plaintiff is absent but his counsel is present when an action is called on for hearing the court cannot just dismiss the action but must allow the plaintiff's counsel to present his case and call witnesses if he has any in support;

(3) the old rule 2(i) of Order 19 was removed from the new rules as it served no purpose. It was redundant. Both the old and new rules provide for the parties to be represented by counsel;

(4) at the hearing of an action the defendant is thus allowed to either appear in person or by counsel; Only if both the defendant and his counsel are absent may a default judgment be entered against the defendant.

F CIVIL APPEAL.

Paramjit Singh for the appellant.

Lalchand N. Thadani for the respondent.

Cur. Adv. Vult.

Ajaib Singh J.: This is an appeal against the decision of the learned magistrate who had given judgment against the defendant by default. The plaintiffs' claim was for the sum of \$3,904 being advances made to the defendant and the defendant had filed a defence denying the claim. When the action was called on for hearing on July 4, 1981 the plaintiffs' representative was present together with their counsel. The defendant was absent but his counsel was present. Thereafter on the oral application of the plaintiffs' counsel the learned magistrate gave judgment in favour of the plaintiffs under Order 28 rule 6(1)(a) of the Subordinate Courts Rules 1980 which reads as follows —

"6. (1) If, when an action, other than actions to which Orders 43 and 45 apply, is called on for hearing, the plaintiff appears but the defendant does not appear, the court may:

(a) if the defendant has no counterclaim, on proof of service give judgment for the plaintiff on his claim;"

In my view it was wrong for the learned magistrate to give judgment against the defendant by default. It is true that the defendant himself was absent when the case was called up for hearing but as his counsel was present the learned magistrate was not empowered to invoke rule 6(1)(a) of Order 28